Supreme Court, U. S.
FILED
FEB 6 1975
MICHAEL RODAK, JR., CLERK

No. 52, Original

# In the Supreme Court of the United States

October Term, 1974

United States of America, plaintiff

*v.*

State of Florida

## REPLY BRIEF OF THE UNITED STATES

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### INTRODUCTION

Two separate sets of exceptions to the Report of the Special Master have been filed in this case. The State has excepted to, *inter alia,* the Special Master's determinations that, under this Court's decision in *United States* v. *California,* 332 U.S. 19, the State's proprietary rights in the adjacent seabed are limited to those granted by Congress in the Submerged Lands Act, 43 U.S.C. 1301 *et seq.,* and that the waters of the Gulf of Mexico that lie between the mainland and the Florida Keys, east of a line running due northeast from the Tortugas Islands to Cape Romano, do not comprise an historic bay belonging to the State. We answered the State's contentions on those points in a responsive brief filed in August 1974.

The United States excepted to the Special Master's determinations that a smaller body of water lying between the mainland and the upper Florida Keys, east of a line drawn between Knight Key and the East Cape

of Cape Sable, comprises a juridicial bay and that the narrow waters within three groups of outlying islands are inland waters of the State. In August 1974 the State filed a brief purporting to respond to the exceptions of the United States. In fact, however, the United States' exceptions are not opposed in that brief; the State apparently concedes (Br. 3, 4)[1] that no part of the area it designates generally as Florida Bay is a juridical bay, and it raises no objection to the United States' contention that the narrow waters within the three groups of outlying islands are not inland waters.

Instead, the State in its responsive brief merely reargues its own exceptions. The State again argues (Br. 12-18) that its seabed rights extend beyond the limits set forth in the Submerged Lands Act and (Br. 3-11) that it possesses a large portion of the Gulf of Mexico as an historic bay. The State's arguments on the former point are, we believe, adequately met in our responsive brief and we do not address them further here. But since the State, in discussing the historic-bay issue, has raised new evidentiary matters and requested a remand to the Special Master, we believe that it is appropriate to comment further on the State's claim to an historic bay.

**ARGUMENT**

1. The State argues (Br. 4-8) that the United States' military use of a portion of Florida Bay,[2] and its

[1]"Br." refers to the State's brief in response to the United States' exceptions.

[2]Following the State's practice, we here use the designation "Florida Bay" to refer to the large body of water claimed by the State as an historic bay. The Special Master used the same designation to refer to the much smaller area that he determined to be a juridical bay. See Report, p. 39.



designation of that portion as a "danger area," represent exercises of sovereign authority inconsistent with the federal disclaimer of historic title. We disagree.

The Florida Bay danger area is merely one of many established by this and other nations throughout the high seas:

> From time immemorial, extensive fleet anchorages have been maintained offshore, and naval exercises, parades, and maneuvers have been held at sea. Target practice is held at sea and from coasts outward. Various types of "proving grounds" are established. * * * In addition, all governments with maritime interests establish warning, danger, restricted or prohibited areas for numerous purposes, large areas and small, areas temporarily established and others permanently. They deal with various hazards of navigation. They are regularly marked on hydrographic charts or otherwise through the customary channels brought to the attention of mariners and fisher-folk. At a recent date the United States had "established a total of 447 such warning and/or danger areas." [Reiff, *The United States and the Treaty Law of the Sea* 365-366 (1959).]

The creation of such danger areas has never been considered an exercise of sovereign authority or an assertion of jurisdiction. See Pender, *Jurisdictional Approaches to Maritime Environments—A Space Age Perspective,* XV J.A.G. J. 155, 157-158 (1961). To the contrary, international law has long permitted the use of of high seas for military practices and the establishment of danger areas for such practices. See 4 Whiteman, *Digest*

*of International Law* 549 (1965).[3] Thus, in addition to the United States, France, the United Kingdom,[4] Canada, Australia, and the Soviet Union have all demarcated areas of the high seas for the conduct of military exercises. McDougal & Burke, *The Public Order of the Oceans* 593 (1962).

In particular, the United States has consistently taken the position that "[m]ilitary exercises are a traditional use of the high seas * * *." 34 Dept. State Bull. 566, 567 (1956). See, also, 4 Whiteman, *supra,* at 549; McDougal & Burke, *supra,* at 592. It is therefore clear that the creation of a danger area for the conduct of military exercises in a portion of Florida Bay does not represent an exercise of sovereign authority or an assertion of jurisdiction inconsistent with that Bay's status as international water.

The United States, both in this litigation and in its representations to foreign nations (see Report, p. 42; see, also, p. 25 of our responsive brief), has affirmatively disclaimed sovereignty over the portion of Florida Bay that lies seaward of the three-mile territorial sea.

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[3]The comprehensive breadth of this principle of international law and its widespread acceptance in the international community were reflected in the International Law Commission's rejection, in the course of drafting the 1958 Convention on the High Seas, of a proposal that would have barred the creation of such danger areas "on the high seas near foreign coasts or on international sea routes." See 4 Whiteman, *supra,* at 545.

[4]The British government has formally taken the position that "[t]he temporary use of areas outside territorial waters for gunnery or bombing practice has, as such, never been considered a violation of the principles of freedom of navigation on the high seas." 4 Whiteman, *supra,* at 598.



The existence of a military danger area in those outlying waters does not conflict with that disclaimer.[5]

2. The State further argues (Br. 8-11) that a statement made by Senator Fulbright during Senate consideration of the Tortugas shrimp fishery agreement of 1959 between the United States and Cuba constitutes evidence of foreign acquiescence in the State's claim of historic title to Florida Bay.[6] Again, we disagree.

The 1959 Tortugas shrimp fishery agreement (10 U.S.T. 1703) grew out of concern, arising during the 1950's, that the fishery was becoming depleted. In 1957 the State had enacted legislation that purported to prohibit domestic vessels from shrimping in the Tortugas fishery; that legislation expressly exempted foreign vessels from its coverage. See U.S. Ex. 93. The federal government, recognizing that Cuba's participation would be necessary to the success of any conservation scheme, entered into negotiations with that nation for an agreement covering the operations of both nation's shrimpers. Once Cuba ratified the agreement, it voluntarily observed the State's shrimping regulations pending ratification of the agreement by the United States.[7] It was to that voluntary observance that Senator Fulbright referred.

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[5]Accordingly, the Special Master properly imposed upon the State the burden, which it did not carry, of proving that its claimed historic title was "clear beyond doubt." See *United States* v. *California,* 381 U.S. 139, 175; *United States* v. *Louisiana,* 304 U.S. 11, 73.

[6]Senator Fulbright observed that, pending ratification of the agreement, the United States and Cuba were observing "a 'gentlemen's agreement' regarding Florida's regulations * * *." 105 Cong. Rec. 9846.

[7]Following ratification of the agreement by the United States, a bilateral commission was established that promulgated shrimping regulations for the Tortugas fishery.

Contrary to the State's argument, this history clearly evidences Cuba's understanding (as well as that of the United States) that the Tortugas shrimp fishery lies in international waters. If, as the State contends, Cuba had acquiesced in the State's claim of historic title, no agreement between the two nations with respect to that fishery would have been necessary.[8] Indeed, upholding the State's claim in this case would effectively abrogate the position taken by the United States in negotiating and entering into that international agreement.

## CONCLUSION

The State's request that the case be remanded to the Special Master for further consideration of the evidence should be denied.

Respectfully submitted.

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FEBRUARY 1975.

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[8] The United States prohibits foreign commercial fishing within its territorial waters. 16 U.S.C. 1081; 46 U.S.C. 251.